

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

WILLIAM H. STOLLER,)		
)		
Plaintiff,)		
)		
vs.)	Case No.	CIV-11-294-C
)		
)	Case No.	CIV-11-1144-C
ROBERT A. FUNK, <i>et al.</i> ,)		
)		
Defendants.)		

**DEFENDANTS ROBERT A. FUNK'S AND
THE ROBERT A. FUNK TRUST'S CONDITIONAL
MOTION TO CONSOLIDATE CASES, AND BRIEF IN SUPPORT**

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Attorneys for Defendants Robert A. Funk and the Robert A. Funk Trust

February 25, 2014

Defendants Robert A. Funk and the Robert A. Funk Trust (collectively “Funk”) conditionally move to consolidate the above-styled cases for trial and all future purposes pursuant to Fed. R. Civ. P. 42(a). This Motion is conditional because Funk’s motion for summary judgment (Dkt. No. 125) should be granted disposing of Case No. CIV-11-294-C (the “Direct Action”). In support of this Motion, Funk states as follows:

1. In the Direct Action, Plaintiff Stoller sued Funk, asserting various claims involving, among other things, alleged wrongful taking of monies from Express Services, Inc. (“ESI”).

2. In Case No. CIV-11-1144-C (the “Derivative Action”), Plaintiff sued Funk and additional Defendants Robert Fellingner (“Fellinger”) and Jeri Craig (“Craig”) derivatively on behalf of ESI (a nominal Defendant), asserting various claims involving, among other things, alleged wrongful taking of monies from ESI by Funk.

3. Consolidation is governed by Fed. R. Civ. P. 42(a), which provides:

CONSOLIDATION. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay.

The Direct and Derivative Actions involve significant common questions of law and fact.

4. All parties earlier admitted that Fed. R. Civ. P. 42(a) is satisfied in this case for purposes of discovery. *See Joint Motion for Consolidation of Cases for Discovery*

Purposes Only (Dkt. No. 68) (“All parties to the Direct Action and the Derivative Action agree that there are factual allegations made in both cases which are substantially the same[.]”).

5. Furthermore, Plaintiff Stoller admitted that his claims in the Derivative Action are virtually identical to his claims in the Direct Action. In Plaintiff’s briefs opposing summary judgment in the Derivative Action, Plaintiff adopted and incorporated word-for-word the “Statement of the Case” he had used in his Response to Funk’s Motion for Summary Judgment in the Direct Action. (Dkt. No. 150 in Case No. CIV-11-294). *See Stoller Response to Fellingner MSJ in Case No. CIV-11-01144-C* (Dkt. No. 207), at p. 5; *Stoller Response to Craig MSJ in Case No. CIV-11-01144-C* (Dkt. No. 208), at p. 4. Plaintiff thereby conceded that the same essential case will be tried in both the Direct Action and the Derivative Action. Moreover, both cases involve Stoller's and Funk's agreements with regard to the UU Bar Ranch and allegations involving Funk's conduct with regard to ESI.

6. Courts routinely consolidate cases for trial where, as here, consolidation will promote judicial economy due to the material similarity of factual and legal issues in the two cases. *See Lindley v. Life Investors Ins. Co. of Am.*, 2009 WL 2601949 (N.D. Okla. Aug. 20, 2009) (“Although plaintiff attempts to point out differences between the two cases, any differences are minimal and will not defeat the judicial economy gained by consolidation.”); *see also Henn v. Fidelity Nat. Title Ins. Co.*, 2013 WL 6662204, at *3 (D. Colo. Dec. 17, 2013) (consolidating cases where the material aspects of the

various cases overlapped, the parties' expert and fact witnesses were virtually identical, and no undue inconvenience, delay, or expense would result from consolidation); *Martenson v. Wells Fargo Bank, N.A.*, 2013 WL 4027534, at *2 (D. Utah Aug. 7, 2013) (consolidating cases over defendants' objections based on finding that consolidation would promote judicial economy).

WHEREFORE, in the event the Court does not grant or rule upon Funk's Motion for Summary Judgment in the Direct Action, Funk respectfully requests the Court to consolidate the Direct and Derivative Actions for trial and all further purposes under Case No. CIV-11-294-C. A proposed order granting the relief requested is submitted simultaneously herewith.

Respectfully submitted,

s/ Jay P. Walters

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CERTIFICATE OF SERVICE

☒ I hereby certify that, on February 25, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants: Dennis P. Rawlinson, Amelia A. Fogleman, Scott R. Rowland, Joshua M. Sasaki, W.A. "Drew" Edmondson, George S. Corbyn, Jr., Kiran A. Phansalkar, Crystal A. Johnson, Michael V. Marconi, Cole B. Ramey, Gary S. Chilton, Stephen R. Johnson, James E. Warner, Robert W. Nelson, Graydon Dean Luthey, Jr., Amy J. Pierce, Jeffrey T. Sagalewicz, Gideon A. Lincecum, Guy R. Wood and Brett M. Stingley.

s/ Jay P. Walters

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